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THE FLAG SALUTE CASES AND THE FIRST AMENDMENT

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I. INTRODUCTION

IN *MINERSVILLE SCHOOL DISTRICT V. GOBITIS*[1] JUSTICE FRANKFURTER, speaking for a majority of the Court, held that public school students could be compelled constitutionally to participate in a daily pledge of allegiance and flag salute ceremony despite the children's sincere conscientious belief, as members of Jehovah's Witnesses, that such participation was explicitly forbidden by the Bible and would subject them to eternal damnation.[2] Justice Stone was the sole dissenter, arguing passionately that the compelled participation infringed upon the children's constitutionally protected rights to religious freedom.[3] Despite the overwhelming majority that Justice Frankfurter was able to garner in *Gobitis*, the opinion was short lived. A mere two years later, Justices Black, Douglas and Murphy, who had joined in Justice Frankfurter's majority opinion, took the extraordinary step of announcing in a dissenting opinion in another, unrelated Jehovah's Witnesses case: "Since we joined in

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[1] 310 U.S. 586 (1940).

[2] The belief of the Jehovah's Witnesses is based on a literal understanding of 20 *Exodus* 3-5:

> 3. Thou shalt have no other gods before me.
> 4. Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth;
> 5. Thou shalt not bow down thyself to them, nor serve them . . . .

[3] 310 U.S. at 601.

the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it also was wrongly decided."[4] The following year *Gobitis* was reversed, in one of the most celebrated overrulings in American constitutional history, by *West Virginia State Board of Education v. Barnette*.[5]

In *Barnette* the majority opinion, written by Justice Jackson, held that the coerced flag ceremony contravened the freedom of speech guarantee of the first amendment.[6] Justices Black, Douglas and Murphy added concurring statements that the compelled pledge and salute also violated the constitutionally protected religious freedom of the children.[7] In stark contrast to Justice Frankfurter's leadership of the court in *Gobitis*, no other Justice joined his dissenting opinion in *Barnette*.[8]

The flag salute cases have been a source of endless fascination for legal and historical scholars.[9] Most of this large body of scholarship has focused on the apparent oddity of Justice Frankfurter's view that there was no constitutional infirmity in the "petty tyranny"[10] of a governmental requirement that school children engage in a hypocritical affirmation of belief.[11] Unfortunately, the doctrinal importance of the opinions of Justices Jackson and Frankfurter in the flag salute cases as contrasting statements on the interpretation of the freedom of speech guarantee of the first amendment[12]

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[4] Jones v. Opelika, 316 U.S. 584, 623-24 (1942) (Black, Douglas and Murphy, JJ., dissenting). The dissenters' comments are even more striking in light of the pointed effort made by the *Jones* majority to distinguish *Gobitis* as inapplicable to that case. *Id.* at 598.

[5] 319 U.S. 624 (1943).

[6] *Id.* at 625.

[7] *Id.* at 643 (Black and Douglas, JJ., concurring); *id.* at 644 (Murphy, J., concurring).

[8] *See id.* at 646 (Frankfurter, J., dissenting). Justices Reed and Roberts also dissented but refused to concur in Justice Frankfurter's opinion. *Id.* at 642-43 (dissenting notation).

[9] *See, e.g.*, H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981); D. MANWARING, RENDER UNTO CAESAR (1962); L. STEVENS, SALUTE! THE CASE OF THE BIBLE VS. THE FLAG (1973); H. THOMAS, FELIX FRANKFURTER—SCHOLAR ON THE BENCH 45-68 (1960); Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, 1977 SUP. CT. REV. 257.

[10] Barnette v. West Virginia State Bd. of Educ., 47 F. Supp. 251, 255 (S.D.W.Va. 1942), *aff'd*, 319 U.S. 624 (1943).

[11] Thus, the suggestions have been made that Justice Frankfurter's view was attributable to the impact of "Frankfurter's own assimilation as an immigrant Jew into American Life," Danzig, *supra* note 9, at 274; his "conception of the role of the public schools as secular, nationalizing agencies," A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 33 (1978) and H. THOMAS, *supra* note 9; or his intense and contemporaneous involvement, as an advisor to President Roosevelt, in the preparation of the nation for military intervention into World War II, H. THOMAS, *supra* note 9, and Danzig, *supra* note 9, at 266-71.

[12] U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech . . . ."

and the function of the judiciary in preserving our most precious civil liberty has been almost wholly ignored.

There are several reasons why an examination of the cases from this perspective is especially important. First, the major casebooks almost uniformly treat *Barnette* and *Gobitis* as freedom of religion cases and ignore Justice Jackson's significant contribution to free speech theory.[13] Second, the flag salute controversy has been revived recently in several cases where the individual's motive for refusal to participate was not religiously based.[14] Third, a proper appreciation of *Barnette* as an important free speech precedent is necessary to a proper understanding of the constitutionality of analogous governmental regulations, such as the requirement that individuals, litigants and spectators alike, stand in a courtroom at specified times as a gesture of respect.[15] Finally, the United States Supreme Court has rediscovered *Barnette*, after years of desuetude, as a major doctrinal freedom of expression precedent.[16]

II. JUSTICE JACKSON'S ABSOLUTISM VERSUS JUSTICE FRANKFURTER'S BALANCING

The issue of whether "balancing" or "absolutism" is the appropriate mode of interpreting the constitutional guarantee of freedom of expression has always been of central importance in first amendment jurisprudence.[17] Unfortunately, the issue was obscured by the misleading

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[13] *See, e.g.*, E. BARRETT, CONSTITUTIONAL LAW: CASES AND MATERIALS 1476 (5th ed. 1977); P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 1345 (4th ed. 1977); P. KAUPER, CONSTITUTIONAL LAW: CASES AND MATERIALS 1247 (4th ed. 1972); W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1265 (4th ed. 1975). The apparent exception, which perhaps proves the rule, is G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1045 (9th ed. 1975).

[14] *See, e.g.*, Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973); Russo v. Central School Dist., 469 F.2d 623 (2nd Cir.), *cert. denied*, 411 U.S. 932 (1972); Banks v. Board of Public Educ., 314 F. Supp. 285 (S.D. Fla. 1970), *aff'd mem.*, 450 F.2d 1103 (5th Cir. 1971); Hanover v. Northrup, 325 F. Supp. 170 (D. Conn. 1970); Frain v. Baron, 307 F. Supp. 27 (E.D.N.Y. 1969).

[15] Findings of contempt of court for refusal to stand in a gesture of respect have been almost uniformly upheld. *See, e.g.*, United States v. Abascal, 509 F.2d 752 (9th Cir.), *cert. denied*, 422 U.S. 1027 (1975); *In re* Chase, 468 F.2d 128 (7th Cir. 1972); Comstock v. United States, 419 F.2d 1128 (9th Cir. 1969); United States *ex rel.* Robson v. Malone, 412 F.2d 848 (7th Cir. 1969). *Contra* United States v. Snider, 502 F.2d 645 (4th Cir. 1974).

[16] *See, e.g.*, Board of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. ____, 102 S. Ct. 2799 (1982); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Wooley v. Maynard, 430 U.S. 705 (1977); Elrod v. Burns, 427 U.S. 347 (1976).

[17] *See, e.g.*, Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963); Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964).

and unproductive debate which occurred almost two decades ago between Justice Harlan, representing the balancers, and Justice Black, representing the absolutists.[18] This debate suffered not only because the absolutist position became hopelessly confused with Justice Black's reliance on a literal reading of the text of the first amendment,[19] but also because Justice Harlan "substitute[d] caricature for refutation"[20] by representing Justice Black's position as urging that the first amendment be treated as absolute in scope.[21] When the debate was waged in these terms it was a "fruitless one."[22] Two decades earlier, however, the debate was waged between Justice Jackson and Justice Frankfurter on terms which illuminated rather than obscured the real jurisprudential issue: whether the first amendment should be interpreted as positive law with some judicially discoverable essential meaning which it is the duty of the courts to enforce fully, or whether the constitutionally guaranteed freedom of expression should be treated by the courts as an interest which should be balanced pragmatically against other important, governmental interests.[23]

In *West Virginia State Board of Education v. Barnette*, Justice Jackson's majority opinion provided a lucid exposition of the absolutist view that the first amendment embodies an essential meaning to which it is the duty of the judiciary to afford absolute constitutional protection. Justice Jackson approached the case from the perspective of the governmental interests asserted in support of the flag salute requirement rather than from a focus on the nature of the conduct of the particular Jehovah's Witnesses children. The children's "possession of particular religious beliefs" merely "supplie[d] appellees' motive for enduring the discomforts of making the issue in this case,"[24] and was irrelevant to the process of

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See also J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 718-22 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 582-84 (1978).

[18] *See* Konigsberg v. State Bar, 366 U.S. 36 (1961); *id.* at 56 (Black, J., dissenting); Barenblatt v. United States, 360 U.S. 109 (1959); *id.* at 134 (Black, J., dissenting).

[19] *See, e.g.*, Konigsberg v. State Bar, 366 U.S. at 61 (Black, J., dissenting); Barenblatt v. United States, 360 U.S. at 140-41 (Black, J., dissenting); Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 552-54 (1962).

[20] Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 248.

[21] *See* Konigsberg v. State Bar, 366 U.S. at 49. Justice Black always placed clear limits on his absolutism. *See id.* at 64 (Black, J., dissenting); Barenblatt v. United States, 360 U.S. at 141-42 (Black, J., dissenting); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949). *See also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 515 (1969) (Black, J., dissenting); Adderley v. Florida, 385 U.S. 39 (1966); Brown v. Louisiana, 383 U.S. 131, 151 (1966) (Black, J., dissenting).

[22] Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. L. REV. 428, 444 (1967).

[23] *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[24] *Id.* at 634.

constitutional decision-making. The crucial question was "whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution."[25] Thus, for the *Barnette* majority the issue was not whether the children should be allowed an exemption from a required ceremony, but whether governmental officials had the legitimate authority to compel such participation in the first instance.[26] In order to answer this question it was necessary to identify the interest the government was attempting to protect or pursue by the means of the compulsory flag salute ceremony. Justice Jackson first emphasized that the government's interest in preventing disruption of the educational environment was not implicated in *Barnette*: "[T]he refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in these cases that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual."[27]

Nor was the government's compulsion of the flag salute ceremony grounded upon any official claim that the ritual had educational value.[28] The sole governmental interest asserted in support of the officially mandated ceremony was the "promotion of national unity" or patriotism.[29] The question presented for judicial resolution in *Barnette*, reasoned Justice Jackson, was thus simply "whether under our Constitution compulsion as here employed is a permissible means for [the] achievement"[30] of national unity or patriotism.

Justice Jackson, by stating the issue as the constitutional permissibility of the asserted governmental power to enforce patriotism by the means of compelling an affirmation of belief rather than whether some individuals were entitled to an exemption from a presumptively proper exercise of governmental authority, avoided judicial consideration of the wisdom of the state's policy:

> Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. . . . [V]alidity of the asserted

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[25] *Id.* at 636.

[26] *Id.* at 634-36.

[27] *Id.* at 630.

[28] *Id.* at 631 n.12.

[29] *Id.* at 626-28, 628 n.2, 631, 631 n.12, 640.

[30] *Id.* at 640. The *Barnette* majority stated that "[n]ational unity as an end which officials may foster by persuasion and example is not in question." *Id.* Clearly, the government, which spends millions attempting to convince its citizens of its goodness and virtue and persuade them of the wisdom of its policies and personnel, has a legitimate interest in such activities. *See, e.g.*, Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 97 (1977); Wooley v. Maynard, 430 U.S. 705, 717 (1977); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 697-716 (1970).

> power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.[31]

The majority opinion, rather than evaluating the wisdom of the governmental policy, focused on the freedom of speech clause of the first amendment and found that it contained a core of absolute protection which the government could not infringe constitutionally regardless of any perceived wisdom in so doing. No paraphrase can capture the eloquence of Justice Jackson's statement of principle: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[32]

This, *Barnette* holds, is the essential meaning of the first amendment which must be accorded absolute judicial protection: it is not the legitimate business of government in this nation to prescribe the "right" opinion for its citizens. False doctrine is absolutely protected by the first amendment and no governmental official is constitutionally empowered to penalize an individual for expressing a message the government disagrees with or for refusing to express or affirm an idea which the government endorses. This "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[33] This is not the entire scope of the first amendment and no doubt the first amendment substantively limits governmental action beyond that which the government attempts to justify on the grounds of an official desire to penalize false doctrine.[34] But the *Barnette* majority clearly explicated the heart of the first amendment's command and had no need to consider the periphery.

Justice Jackson supported this judicial interpretation of the freedom of speech clause of the first amendment on both utilitarian and philosophical grounds. His first, pragmatic rationale was that the suppression of dissent inevitably leads to the suppression of dissenters and this, in return, leads to the disregard of all liberty: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."[35]

The progress of the flag salute controversy is itself evidence that Justice Jackson's argument was not fanciful. For the *Gobitis* majority the prac-

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[31] 319 U.S. at 634.

[32] *Id.* at 642.

[33] *Id.*

[34] *Id.* at 633-34.

[35] *Id.* at 641.

tical consequence of an individual's refusal to participate in the flag salute ceremony was merely the expense of a private education.[36] In fact, however, as a result of official efforts to enforce the requirement, parents had been subjected to the threat of imprisonment, and children were subjected to the threat of being made wards of the state and of being removed from the custody of their parents.[37]

The *Barnette* majority was not content, however, to rest its opinion on utilitarian grounds. The majority ultimately based its interpretation of the freedom of speech clause on the very nature of our democratic form of government:

> There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.[38]

Justice Jackson did not balance or "categorize" competing interests in *Barnette* and somehow decide that the government's interest in compelling an affirmation of belief in a "correct" point of view was out-weighed by an interest in being free of such coercion.[39] Instead, the *Barnette* majority enunciated an absolute first amendment principle traceable to the role of freedom of expression in a self-governing democracy.

There was nothing unique in Justice Jackson's recognition of the fundamental principle that, in a democracy, the government is absolutely barred from prescribing or proscribing any individual activity on the grounds of official agreement or disagreement with the ideological message the activity is believed by the government to express. A long line of impressive precedent supported this interpretation of the freedom of expression guarantee of the first amendment.[40] Indeed, this was the Supreme Court's explicit rationale, in *Stromberg v. California*,[41] for holding that

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[36] Minersville School Dist. v. Gobitis, 310 U.S. 586, 592 (1940).

[37] *Barnette*, 319 U.S. at 629. *See also* Bolling v. Superior Court, 133 P.2d 803 (Wash. 1943) (reversing court order declaring children wards of the court and ordering their removal from parents' home); *In re* Latrecchia, 128 N.J.L. 472, 26 A.2d 881 (1942) (reversing criminal conviction).

[38] 319 U.S. at 641.

[39] Such is the mode of first amendment analysis offered by some modern first amendment theorists. *See, e.g.*, L. TRIBE, *supra* note 17, at 580-84; Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

[40] *See, e.g.*, Herndon v. Lowry, 301 U.S. 242 (1937); DeJonge v. Oregon, 299 U.S. 353 (1937); United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting). *Cf.* Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917).

[41] 283 U.S. 359 (1931).

a state could not constitutionally penalize the display of a red flag as a symbol of opposition to organized government. The difference between *Barnette* and *Stromberg*, as Justice Jackson observed, was an emotional, not an analytical one: in *Barnette* "the flag involved [was] our own."[42]

The focus of the *Barnette* majority on the nature of the applicable governmental regulation rather than the character of the activity of the Jehovah's Witnesses children gave its opinion an analytical beauty and clarity which represents the finest tradition of first amendment jurisprudence.[43] The *Barnette* majority was thus able to avoid consideration of the wisdom of the state's policy,[44] consideration of the impossible issue of whether the children's refusal to participate in the ceremony constituted expression or action,[45] and consideration of whether the children's activity should be characterized as political or religious expression.[46] The reality, fully recognized by Justice Jackson, is that whenever the government seeks to compel or prohibit any activity because of the state's agreement or disagreement with the message that activity is officially believed to express, the government's conduct gives that activity both an expressive character and a political significance.[47] This is true regardless of whether the individual subjected to the governmental regulation is aware of the fact.[48] By reasoning from the perspective of the character

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[42] 319 U.S. at 641.

[43] For more recent examples of this mode of first amendment analysis, see Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972); Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576 (1969); New York Times v. Sullivan, 376 U.S. 254 (1964).

[44] 319 U.S. at 634.

[45] Thus, while Justice Jackson found that the state-mandated ceremony was expressive in character, he did not find it necessary to inquire whether the refusal to participate in such a ceremony was expressive. *Id.* at 632-34.

It is today recognized that no sound first amendment doctrine can be founded on a purported analytical distinction between expression and action. *See, e.g.*, L. TRIBE, *supra* note 17, at 598-601; Ely, *supra* note 39, at 1493-96; Kalven, *The Concept of the Public Forum; Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 23.

[46] 319 U.S. at 634-35. Attempts have been made to ground first amendment theory on a supposed distinction between "political" speech and other categories of speech. *See, e.g.*, A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). The intellectual inadequacy of such attempts is explained in H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 46-50 (1965); Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10-13.

[47] 319 U.S. at 631, 640-41.

[48] Thus, for example, in Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977), the individuals merely wished to express a willingness to engage in a simple commercial transaction by placing "For Sale" signs on the front lawns of homes offered for sale, but the government attempted to prohibit such activity because it perceived the signs as expressing the message that the community was a racially

of the governmental regulation, the *Barnette* majority was able to announce an absolute first amendment principle: in a democracy the government has no lawful authority to compel the expression of a "correct" opinion or to prohibit the expression of an "erroneous" opinion.[49]

Justice Frankfurter's balancing approach in the flag salute controversy was different in every respect from the *Barnette* majority's reliance on absolute legal principles derived from the essential meaning of the first amendment. Indeed, Justice Frankfurter explicitly denied the very existence of absolute legal principles.[50] On the basis of this premise Justice Frankfurter necessarily perceived the court's role in the flag salute controversy as the pragmatic reconciliation of two competing interests.[51] Justice Frankfurter fortified his reliance upon a balancing approach by analogy[52] to the secular regulation rule which was then used by the court in freedom of religion cases.[53] Under the secular regulation rule, "[c]onscientious scruples [do not relieve] the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[54] Contrary to Justice Frankfurter's initial premise, the secular regulation rule did, by implication, recognize an absolute legal principle which even Justice Frankfurter was willing to honor: "If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand."[55] The proper analogy from the freedom of religion clause to the freedom of speech clause would seem obvious; the former is designed to prohibit governmentally imposed

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unstable, undesirable place to live. *Id.* at 96-97. *See also* Wooley v. Maynard, 430 U.S. 705 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Greer v. Spock, 424 U.S. 828 (1976).

Unfortunately, the Supreme Court has not always been true to Justice Jackson's insight. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 713 n.10 (1977); Spence v. Washington, 418 U.S. 405, 410-11 (1974).

[49] 319 U.S. at 642. *See also* Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

[50] Minersville School Dist. v. Gobitis, 310 U.S. 586, 594 ("[n]o single principle can answer all of life's complexities."). *See also* Dennis v. United States, 341 U.S. 494, 524 (1951) (Frankfurter, J., concurring).

[51] *Gobitis*, 310 U.S. at 594 ("Our present task, then, . . . is to reconcile two rights in order to prevent either from destroying the other.").

[52] *Id.* at 595 ("Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom.").

[53] *See, e.g.*, Hamilton v. Regents, 293 U.S. 245 (1934); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878). The secular regulation doctrine has been since repudiated by the Supreme Court. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). Eventually even Justice Frankfurter was to reject the secular regulation rule. *See* McGowan v. Maryland, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring).

[54] 310 U.S. at 594.

[55] *Barnette*, 319 U.S. at 651 (Frankfurter, J., dissenting); *Gobitis*, 310 U.S. at 593.

religious orthodoxy and the latter clause prohibits governmentally imposed political orthodoxy. Indeed, a respectable body of Supreme Court precedent has reached precisely this conclusion.[56] Justice Frankfurter, however, not only ignored these cases but also failed to recognize the analogy: "An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority . . . ."[57]

Justice Frankfurter also attempted to justify his balancing methodology by the citation of *Schneider v. State*,[58] a then recent free speech case in which the Supreme Court had utilized a similar mode of reasoning in order to invalidate state anti-littering statutes which prohibited the distribution of handbills. Unfortunately, *Schneider* was simply not apposite to the type of governmental regulation at issue in the flag salute cases. The statutes in *Schneider* were time, place and manner regulations which prohibited all handbilling without reference to the ideological message the handbills contained.[59] The flag salute requirement was fundamentally different because it was explicitly justified by reference to the ideological message the expression of which the government was attempting to coerce. In the past, when the Court had been confronted with similar content regulations, it had never used a balancing test.[60]

Even assuming that reliance on *Schneider v. State* supported rather than refuted the propriety of applying a balancing test in the flag salute cases, the issue remains whether Justice Frankfurter applied that test in a defensible manner. Here again we find Justice Frankfurter's mode of analysis seriously deficient. Justice Frankfurter not only assumed the crucial question of the very legitimacy of the governmentally compelled flag salute ceremony,[61] but he inflated its importance beyond recognition. Thus, in Justice Frankfurter's hands, the governmental purpose of instilling patriotism and national unity was equated with the government's interest in protecting the "national security" and labelled as "an interest inferior to none in the hierarchy of legal values."[62]

After inflating the governmental interest in compelling participation in a flag salute ceremony into an interest in preserving the security of

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[56] *See supra* notes 40-41 and accompanying text.

[57] 319 U.S. at 654 (Frankfurter, J., dissenting).

[58] 308 U.S. 147 (1939).

[59] *Id.* at 154-58.

[60] *See, e.g.*, Hague v. C.I.O., 307 U.S. 496 (1939); Lovell v. Griffin, 303 U.S. 444 (1938); DeJonge v. Oregon, 299 U.S. 353 (1937). *See also* Kalven, *supra* note 45, at 23-25.

[61] *See Gobitis*, 310 U.S. at 598 ("Surely, however, the end is legitimate.").

[62] *Id.* at 595. For further discussion of Frankfurter's inflation and deflation of the characterization of governmental interests as a judicial technique, *see* Danzig, *supra* note 9, at 259-66.

the nation in time of war Justice Frankfurter then relied on this characterization of the importance of the governmental interest to justify a refusal to scrutinize judicially the appropriateness or efficacy of the means chosen by the government to achieve its purpose: "The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment. Even were we convinced of the folly of such a measure, such belief would be no proof of its unconstitutionality."[63]

By the sleight of hand of inflating the governmental interest and then relying on that inflation to justify a refusal to scrutinize the means chosen by the government to achieve its purpose Justice Frankfurter wholly avoided the question, considered by Justice Jackson, of whether "the strength of the government to maintain itself would be impressively vindicated by . . . confirming power of the State to expel a handful of children from school."[64] Regardless of the importance of the state's ultimate interest, certainly it must be recognized that the means chosen to achieve that purpose may be so inefficient as to render the infringement on constitutionally protected liberties gratuitous: "[S]urely at some point, not too remote, the unwisdom of the state's policy undermines the legitimate interest of the state. Or to put this another way, the legitimate interest of a state in foolish legislation is difficult to isolate."[65]

Perhaps less apparent, but equally true, it is also possible that the means chosen by the state to achieve its goal might be positively counterproductive and destructive of the purposes sought to be attained by the state. This was precisely the situation regarding the compulsory flag salute ceremony in the eloquent concurring opinion of Judge Lehman of the New York Court of Appeals: "The flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience. The flag 'cherished by all our hearts' should not be soiled by the tears of a little child."[66]

When we shift our focus from the government's interest to the first amendment side of Justice Frankfurter's balance, his performance in the flag salute cases becomes no more impressive. Against the government's interest, Justice Frankfurter merely weighed the free speech interest of the Jehovah's Witnesses children instead of society's interest in freedom of expression.[67] The objection to such a skewed weighting of the competing interests is well known.[68] Justice Frankfurter, however, proceeded

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[63] *Id.* at 598. *See also id.* at 595, *distinguishing* Schneider v. State, 308 U.S. 147 (1939).

[64] *Barnette*, 319 U.S. at 636.

[65] H. KALVEN, *supra* note 46, at 89.

[66] People *ex rel.* Fish v. Sandstrom, 279 N.Y. 523, 539, 18 N.E.2d 840, 847 (1939).

[67] *See Gobitis*, 310 U.S. at 594, 599-600; *Barnette*, 319 U.S. at 653, 655.

[68] *See* Barenblatt v. United States, 360 U.S. 109, 144-45 (1959) (Black, J., dissenting).

to diminish the free speech side of the scale even further by characterizing the Jehovah's Witnesses children as "dissidents"[69] whose religious beliefs were "obnoxious to the cherished beliefs of others."[70] When the government's interests in preserving national security, without regard to the efficacy of the means chosen to achieve this end, were weighed against the claim that "exceptional immunity . . . be given to dissidents,"[71] Justice Frankfurter's conclusion was foregone. All that remained was the gratuitous additional argument that the free speech claim of the Jehovah's Witnesses was further diminished because "the effective means of inducing political changes [were] left free from interference."[72] This argument, however, is nothing more than the old invocation of the right-privilege distinction[73] which had been rebutted in a similar context in *Schneider v. State*: "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[74]

The contrast between the opinions of Justices Frankfurter and Jackson in the flag salute cases could not be more vivid. On the one hand, Justice Jackson resolved the compulsory flag salute issue by invoking an absolute principle traceable to the freedom of expression clause of the first amendment. Justice Frankfurter, on the other hand, never directly addressed the merits of the legal principle invoked by Justice Jackson, but dismissed it with the general observation that there could be no absolute legal principles. Instead of relying on principle to resolve the flag salute controversy, Justice Frankfurter judicially duplicated the pragmatic balancing of interests which had been undertaken by a coordinate branch of the state government upon the enactment of the flag salute requirement. Justice Frankfurter upheld the exertion of governmental power to coerce participation in a patriotic ceremony by assuming the legitimacy and importance of the state's interest, ignoring the efficacy of the means chosen to achieve that interest and devaluing the dignity of the freedom of expression claim championed by the Jehovah's Witnesses children.

III. TWO DIFFERING CONCEPTIONS OF THE JUDICIAL FUNCTION

Justices Frankfurter and Jackson invoked two entirely different con-

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[69] *See Gobitis*, 310 U.S. at 599-600; *Barnette*, 319 U.S. at 653, 655 (Frankfurter, J., dissenting).

[70] *See Gobitis*, 310 U.S. at 594.

[71] *Id.* at 599-600.

[72] *Id.* at 600.

[73] *Cf.* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[74] 308 U.S. 147, 163 (1939). For modern invocations of this principle, *see* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 n.15 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975); Spence v. Washington, 418 U.S. 405, 411 n.4 (1974).

ceptions of the proper interpretation of the freedom of speech clause of the first amendment. In addition, both attempted to justify their flag salute opinions by reference to two entirely different conceptions of the appropriate judicial function in reviewing the constitutionality of governmental regulations.

Justice Frankfurter initiated the larger debate on the proper mode of utilization of the power of judicial review. He argued strenuously that his result in *Gobitis* upholding the compulsory flag salute ceremony was dictated by the necessity of observing appropriate limitations on the Court's power to determine the constitutionality of governmental regulations.[75] Arguably, his advocacy of judicial self-restraint did not influence his substantive decision on the freedom of expression issue; rather it was his mode of interpreting the first amendment which necessitated his philosophy of judicial self-restraint.

Justice Frankfurter emphasized three interrelated themes in support of his conception of the judicial function. First, in Justice Frankfurter's view, there is only one test of the constitutionality of governmental regulations regardless of which provision of the Bill of Rights is invoked in opposition to the claim of legitimate authority: "There is no warrant in the constitutional basis of this Court's authority for attributing different roles to it depending upon the nature of the challenge to the legislation. . . . [T]he function of this Court does not differ in passing on the constitutionality of legislation challenged under different Amendments."[76]

Second, the one universal test which Justice Frankfurter believed appropriate to test judicially the constitutionality of governmental regulations was the "rational basis" test:

> We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether it will fulfill its purpose. Only if there be no doubt that any reasonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours.[77]

Finally, the third underlying premise for Justice Frankfurter's philosophy of judicial self-restraint was his view that the institution of judicial review is fundamentally undemocratic:

> The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic pro-

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[75] *Gobitis*, 310 U.S. at 598-600; *Barnette*, 319 U.S. at 646-71 (Frankfurter, J., dissenting).

[76] *Barnette*, 319 U.S. at 648-49 (Frankfurter, J., dissenting).

[77] *Id.* at 661-62. *See also id.* at 666: "[S]ome other tests of constitutionality must surely be guiding the Court than the absence of a rational justification for the legislation. But I know of no other test which this Court is authorized to apply in nullifying legislation."

> cess. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.[78]

Justice Frankfurter clearly explained the interdependence of the three rationales for judicial self-restraint: "If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate."[79] Thus, for Justice Frankfurter the anti-majoritarianism of the Court's argument for judicial review was philosophically dependent on the appropriateness of the rational basis test of the constitutionality of governmental regulations. In addition to this philosophic argument, Justice Frankfurter suggested a pragmatic justification for judicial self-restraint which related to his concern for democratic self-government. In Justice Frankfurter's view, judicial self-restraint would result in the legislature taking its responsibilities more seriously and, consequently, lead to the "abandonment of foolish legislation."[80] Of course, such a normative proposition is incapable of empirical verification. But if the aftermath of the *Gobitis* opinion is any indication of the wisdom of Justice Frankfurter's argument, the verdict is unequivocal. After the *Gobitis* decision was announced there was a manifold increase in the number of state and local governments instituting or enforcing compulsory flag salute requirements[81] and a wave of anti-Jehovah's Witness persecution and violence swept across the country.[82]

Before considering the validity of Justice Frankfurter's underlying premise for judicial self-restraint and concern for democratic decision-making, that the proper judicial function is no different from the legislative function, the wisdom of the rational basis test he utilized to determine the constitutionality of governmental regulations should be addressed. What is most striking about this "test" is that it is not a test at all, but merely an admonition to judicial self-restraint. Thus, while Justice Frankfurter would caution that the wisdom of a governmental regulation is no criterion for its constitutionality,[83] the rational basis test is essentially a measure of legislative wisdom. Only if a statute is so unwise that no "legislators could in reason have enacted such a law" is the Court entitled to hold the statute unconstitutional.[84] The reason why the wisdom

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[78] *Id.* at 650.

[79] *Id.* at 652.

[80] *Gobitis*, 310 U.S. at 600.

[81] *See* D. MANWARING, *supra* note 9, at 187.

[82] *See id.* at 163-86; L. STEVENS, *supra* note 9, at 106-16.

[83] *Barnette*, 319 U.S. at 647, 661, 670.

[84] *Id.* at 647.

of a statute will assure its constitutionality but the foolishness of a statute will not guarantee its unconstitutionality is simply Justice Frankfurter's belief in judicial self-restraint. In this light it is not surprising that the rational basis test is virtually always satisfied.[85] Not only does this test negatively define the freedom of speech guaranteed by the first amendment as that speech which no reasonable person could conceive of a reason to suppress,[86] but in the hands of Justice Frankfurter this test operated like a rachet to contract progressively the scope of constitutionally protected liberty. Thus, in Justice Frankfurter's view the fact that the Court previously had upheld the compulsory flag salute ceremony foreclosed the issue of whether reasonable minds could differ on its constitutionality.[87]

Justice Frankfurter's underlying premise for judicial self-restraint, that the only test of the constitutionality of governmental regulations is whether the regulation could have been enacted by a rational legislature, is itself subject to serious challenge. In passing on the constitutionality of the compulsory flag salute ceremony, Justice Frankfurter inquired only as to whether a reasonable legislator could believe that such a coerced ritual would further the governmental purpose of encouraging patriotism and national unity.[88] Justice Frankfurter did not attempt to determine judicially what the freedom of speech clause of the first amendment might say about the permissibility of such a ceremony. The irony of Justice Frankfurter's test of constitutionality is that in its application the Bill of Rights is irrelevant. Here, Justice Frankfurter's position that there are no absolutes, that the freedom of speech clause has no essential core meaning can be contrasted profitably with his opinion in *Illinois ex rel. McCollum v. Board of Education.*[89] The issue in *McCollum* was whether the "released time" program for religious instruction for public school premises violated the first amendment's proscription of the establishment of religion. Justice Frankfurter's position was that the program was unconstitutional, not because a reasonable mind could not entertain it, but because "the basic Constitutional principle of absolute separation was violated."[90] The absoluteness of Justice Frankfurter's interpretation of the establishment of religion clause was clear: "Separation means separation, not something less. . . . It is the Court's duty to enforce this principle in its full integrity."[91] Ultimately, the difference between his judicial

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[85] *See* C. BLACK, THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 205-10 (1960); M. SHAPIRO, FREEDOM OF SPEECH: *The Supreme Court and Judicial Review* 16 (1966).

[86] *See* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1441-44 (1962).

[87] *See Barnette*, 319 U.S. at 664-65.

[88] See *id.* at 652, 661-62; *Gobitis*, 310 U.S. at 598-600.

[89] 333 U.S. 203, 212 (1948) (Frankfurter, J., concurring).

[90] *Id.* at 231.

[91] *Id.*

self-restraint in the flag salute cases and his refusal to defer to the legislative judgment in *McCollum* was simply that Justice Frankfurter believed that the establishment clause had a meaning, while he was unable to discover any core meaning in the freedom of speech clause. It is almost as if Justice Frankfurter declared the free speech clause of the first amendment void for vagueness.[92]

Justice Jackson's view of the judicial function was also dependent upon his interpretation of the first amendment. Since, in his view, the essential meaning of the first amendment was the prohibition of the use of governmental power in an attempt to coerce political orthodoxy, it was clear that the compelled flag salute ceremony struck at the very heart of constitutionally protected liberty.[93] While the courts should grant deference to legislative and executive policy judgments when governmental action touches the periphery of constitutional concerns,[94] no such deference is appropriate when governmental action contravenes the essential meaning of the first amendment: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[95]

Justice Jackson held that the Court's authority, indeed its duty, to interpret and enforce the freedom of speech clause of the first amendment is derived from the positive law status of that constitutional provision. Thus, Justice Jackson's majority opinion in *Barnette* foreshadowed the persuasive views of such eminent legal scholars as Professors Black and Wechsler and placed the judicial protection of the first amendment on the firmest possible foundation.[96]

Justice Jackson did not pretend that the Court's responsibility to ascertain the often murky purposes of the Bill of Rights was an easy one,[97] nor can it be doubted that the Court will occasionally err in the exercise of its duties. The Supreme Court is not unique in its capacity to err and the Constitution contains its own correctives for judicial missteps. Perhaps the most important point, however, is that in its exercise of the historically accepted power of judicial review the Court is not to act as a superlegislature or as a national school board, reweighing the wisdom of governmental policies. In Justice Jackson's words:

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[92] *Cf.*, Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962).

[93] *Barnette*, 319 U.S. at 642.

[94] *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939).

[95] *Barnette*, 319 U.S. at 638.

[96] *See* C. BLACK, *supra* note 85, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[97] *See* Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

> Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. . . . [W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.[98]

The function of the Supreme Court is to act as the expositor and guardian of the fundamental principles embodied in the Constitution. One of those principles, contained in the freedom of speech clause of the first amendment, is that the government is constitutionally proscribed from compelling the affirmation of a "correct" idea or from penalizing the expression of an "erroneous" idea. In a democracy there is no place for governmentally coerced political orthodoxy.

IV. *Barnette* AND THE BURGER COURT

A reconsideration of the implications of the Flag Salute cases is a particularly worthy enterprise at the present time because they bring together three themes of unparalleled contemporary interest. First, *West Virginia State Board of Education v. Barnette* and *Minersville School District v. Gobitis* provide an important perspective on the perennially controversial issue of the appropriate judicial function in reviewing the constitutionality of governmental regulations. There is today in the legal literature a renaissance in scholarly and theoretical works on the subject of judicial review.[99] No doubt the Flag Salute cases rival the famous footnote four in *United States v. Carolene Products*[100] as the proper centerpiece for a meaningful theory of judicial review.[101]

Second, the jurisprudence of the freedom of speech clause of the first amendment, while always a popular topic for scholarly endeavor, is presently the subject of uncommonly intense critical analyses.[102] Again,

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[98] *Barnette*, 319 U.S. at 639-40.

[99] *See, e.g.*, P. BOBBITT, CONSTITUTIONAL FATE (1982); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST (1980); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980); Symposium: *Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981).

[100] 304 U.S. 144, 152-53 n.4 (1938).

[101] *See supra* Section III.

[102] *See, e.g.*, M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (forthcoming 1983-84); F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); M. YUDOF, WHEN GOVERNMENT SPEAKS (1982); F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY (1981); A. COX, FREEDOM OF EXPRESSION (1980).

Barnette and *Gobitis* potentially provide an enlightened starting point for an appropriate theory of the meaning of the constitutionally guaranteed freedom of expression in a democratic society.[103]

Third, Justice Frankfurter's proper place in history has been subjected recently to intense re-evaluation by a new generation of biographers[104] and his disciples have been quick to rise to his defense.[105] No doubt this debate is also destined to be a recurring one. It is equally clear that *Barnette* and *Gobitis*, more than any of Frankfurter's other opinions, will be at the heart of this debate.

Each of these three themes has its own allure as a topic for further exposition. My purpose here, however, is more modest. Professor Hirsch has identified *Barnette* as the turning point of Frankfurter's career on the Supreme Court. His leadership was rejected by the Court and he was relegated to the position of a dissenter for his remaining twenty years on the bench.[106] Joseph Lash's judgment is even more harsh. In his view, the Flag Salute cases "uncoupled [Justice Frankfurter] from the locomotive of history."[107] No doubt Justice Frankfurter served as a foil rather than a guru for the Warren Court. What is less clear, however, is whether Justice Frankfurter's jurisprudence remains in bad odor. Here, the view of Justice Douglas is significant: "Most of Frankfurter's decisions at the constitutional level were eroded within a few years after he retired, in 1962, only to be refurbished when the Nixon appointees arrived."[108] There is thus merit in a brief examination of the stature of *Barnette*, and the opinions of Justices Frankfurter and Jackson in the first amendment jurisprudence of the Burger Court. For this purpose, the recent case of *Wooley v. Maynard*[109] is especially noteworthy.

In 1977, after years of desuetude, the United States Supreme Court rediscovered *Barnette* as a major first amendment freedom of expression precedent. In *Wooley v. Maynard*,[110] the plaintiffs, Jehovah's Witnesses,

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[103] *See supra* Section II.

[104] *See, e.g.*, B. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION (1982); H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981).

[105] *See, e.g.*, Cohen, Book Review, 10 HOFSTRA L. REV. 1327 (1982) (reviewing H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981)); Danelski, Book Review, 96 HARV. L. REV. 312 (1982) (reviewing H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981)); French, Book Review, 57 N.Y.U. L. REV. 330 (1982) (reviewing H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981)); Dorsen, Book Review, 95 HARV. L. REV. 367 (1981) (reviewing H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981)); Stone, Book Review, 95 HARV. L. REV. 346 (1981) (reviewing H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981)).

[106] H. HIRSCH, *supra* note 104, at 147-76.

[107] J. LASH, A BRAHMIN OF THE LAW: A BIOGRAPHICAL ESSAY IN FROM THE DIARIES OF FELIX FRANKFURTER 73 (J. Lash ed. 1975).

[108] W. O. DOUGLAS, THE COURT YEARS, 1938-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 22 (1980).

[109] 430 U.S. 705 (1977).

[110] *Id.*

challenged the constitutionality of New Hampshire statutes which required the display of the state motto "Live Free or Die" on the license plates of privately-owned passenger vehicles and criminalized the obscuring of the motto.[111] The plaintiffs, George and Maxine Maynard, had been thrice arrested and convicted for covering up the state motto on the license plates of their automobiles with red reflective tape.[112] They objected, on religious, political and philosophical grounds, to being coerced by the state into publicly advertising an ideological slogan they found abhorrent.[113] The United States Supreme Court affirmed the federal district court's issuance of an injunction prohibiting further prosecution of the plaintiffs for taping over the state motto on their license plates.[114]

As in *Barnette*, the judicial focus in *Wooley* could have been on either the nature of Maynard's activity or on the character of the governmental regulation. Much of the criticism and confusion surrounding *Wooley* is due to a misguided insistence that first amendment adjudication requires an evaluation of the nature of the individual's activity in order to determine whether it is constitutionally protected.[115] From this perspective the issue in *Wooley* would be framed in one, or both, of two ways: 1) whether the Maynards had been engaged in the exercise of constitutionally protected symbolic expression, or 2) whether the Maynards' first amendment right to be free of any governmentally compelled affirmation of belief had been infringed.[116]

In contrast, Chief Justice Burger's majority opinion after a brief, unfortunate and unnecessary dalliance with an examination of the nature

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[111] *Id.* at 707, 709.

[112] *Id.* at 708.

[113] *Id.* at 707. Mr. Maynard described his objection in an affidavit:

> [B]y religious training and belief, I believe my "government"—Jehovah's Kingdom—offers everlasting life. It would be contrary to that belief to give up my life for the state, even if it meant living in bondage. Although I obey all laws of the State not in conflict with my conscience, this slogan is directly at odds with my deeply held religious convictions. . . . I also disagree with the motto on political grounds. I believe that life is more precious than freedom.

Id. at 707 n.2.

[114] *Id.* at 717, *aff'd*, 406 F. Supp. 1381 (D.N.H. 1976). The majority opinion was written by Chief Justice Burger. *Id.* at 706. Justices Rehnquist and Blackmun dissented on the merits. *Id.* at 719. Justice White, joined by Justices Rehnquist and Blackmun, dissented on the ground that the issuance of the injunction was barred by principles of equitable restraint. *Id.* at 717. For discussion of this issue, see *Developments in the Law, Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

[115] *See* Wooley v. Maynard, 430 U.S. at 719 (Rehnquist, J., dissenting). Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. REV. 995 (1982) is representative of the law review literature.

[116] *See* Wooley v. Maynard, 430 U.S. at 719-22 (Rehnquist, J., dissenting); Maynard v. Wooley, 406 F. Supp. 1381 (D.N.H. 1976).

of the Maynards' activity, ultimately focused properly on the character of the governmental regulation and stated the dispositive issue to be "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."[117]

It is profitable to focus initially on the analytical problems inherent in the first two phrasings of the issue in *Wooley*, issue characterizations which find their roots in the methodology of Justice Frankfurter's dissent in *Barnette*. First, if the critical inquiry is deemed to be whether the Maynards' activity of obscuring the state motto on their license plates constitutes constitutionally protected symbolic expression then the judiciary necessarily must decide two difficult factual questions: whether the Maynards possessed "[a]n intent to convey a particularized message," and whether, "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[118] Assuming that there is any intellectual coherence in a distinction between "expression" and "action,"[119] a focus on the nature of the individuals' activity serves only the single purpose of narrowing the scope of constitutional protection, thereby turning the first amendment on its head. Instead of the first amendment fulfilling its proper role as "an impenetrable bulwark against every assumption of [governmental] power,"[120] this methodology places the first amendment as a barrier which the private litigant must hurdle as a condition precedent to judicial consideration of a claim of governmental infringement of the constitutional guarantee.

Furthermore, the application of this approach requires the abandonment of principle in favor of judicial fact-finding of "facts" incapable of objective ascertainment. Before it can be determined whether the particularized message of an activity is understood by those who view it, several value judgments must be made. Thus, it must be judicially decided who constitutes the relevant audience, what proportion of that audience must understand the message and how precisely the message must be understood.[121]

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[117] 430 U.S. at 713.

[118] Spence v. Washington, 418 U.S. 405, 410-11 (1974).

[119] Professor Kalven, however, demonstrated the analytical futility of this purported distinction many years ago in his seminal essay, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 12. For more recent, derivative scholarship criticizing the "expression"-"action" distinction, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 598-601 (1978); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

[120] 1 ANNALS OF CONG. 439 (J. Madison ed. 1789).

[121] The built-in bias against new ideas should be noted here. The very requirements of audience understanding necessitates previous audience familiarity with the message and ignores the function of symbols in arousing curiosity about

When the governmental interest supporting a regulation is to burden the expressive content of the individuals' activity, then this focus is distinctly non-neutral. It serves only to expand the power of the government to suppress the ideological message of activities it finds expressive. Moreover, once this barrier is overcome, a judicial focus on the nature of the individuals' activity provides, as Justice Frankfurter's dissenting opinion in *Barnette* demonstrates, no standards or guidance for the resolution of the substantive issue of whether the activity can be regulated consistent with the Constitution. No doubt, then, Chief Justice Burger was wise to refuse to pass on the symbolic expression "issue" which he appropriately considered unnecessary to a principled decision in *Wooley*.[122]

The second possible statement of the issue in *Wooley*, whether the Maynards' first amendment right to be free of any governmentally compelled affirmation of belief had been violated, also mandates a judicial inquiry into the nature of the individuals' activity rather than the character of the governmental regulation. Both the majority opinion and the dissenting opinion devoted attention to this issue. Chief Justice Burger, although asserting that *Barnette* "involved a more serious infringement upon personal liberties"[123] than *Wooley*, had no difficulty in concluding that the New Hampshire statute "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[124] In contrast, Justice Rehnquist reached precisely the opposite conclusion. These two opinions demonstrate the

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an idea. *See, e.g.*, the testimony of George Maynard:

> A lot of people stop me. And one person says, "You can't do that. That's against the law." I says "Fortunately, I was given permission by the Federal Court in a temporary injunction against the State." And here I was able to converse with him and express my beliefs and my reason for doing so. And so, therefore, I was able to bear witness to the truth of God's Kingdom.

Brief for Appellee at 60-61, Wooley v. Maynard, 430 U.S. 705 (1977).

[122] 430 U.S. at 713. In an unfortunate footnote, however, Chief Justice Burger declared that display of special license plates issued by the state without the state motto would not be "sufficiently communicative to sustain a claim of symbolic expression." *Id.* at 713 n.10. Obviously, if the state issued such license plates to the Maynards, the symbolic expression would never arise. Chief Justice Burger then compounded confusion and demonstrated the intellectual difficulties inherent in a judicial focus on the nature of the individuals' activity by concluding that the Maynards' prayer for issuance of "expurgated" license plates "substantially undermined" their claim that taping over the state motto on the license plates they were issued constituted symbolic expression. *Id.* A more plausible interpretation of the Maynards' position, however, is simply that while they would have preferred to remain silent by displaying "expurgated" license plates, nevertheless if the state insisted on coercing them into entering public debate by displaying the state motto, then they were constitutionally entitled to symbolically express their opposition by covering the motto.

[123] 430 U.S. at 715.

[124] *Id.*, *quoting* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

analytical incoherence, originally found in Justice Frankfurter's dissent in *Barnette*, of focusing on the nature of the individuals' activity. Two flaws are particularly striking: 1) such a focus forces the Court to abandon doctrinal principle in favor of artificial line drawing between competing interests, and 2) such a focus erects an improper barrier which the litigant must overcome before the constitutional propriety of the government's conduct can be judicially reviewed.

The first analytical flaw is most apparent in Justice Rehnquist's dissenting opinion. In his view there would be no unconstitutional affirmation of belief unless the individual was placed "in the position of either apparently or actually 'asserting as true' the [government's] message."[125] The doctrinal poverty of this test, despite its facial allure as a statement of constitutional principle, is most clearly demonstrated by an examination of the hypothetical cases suggested by Justice Rehnquist and the subsequent Supreme Court decision in *Prune Yard Shopping Center v. Robins*.[126]

Three examples of unconstitutional governmentally compelled affirmation of belief situations were offered in the dissenting opinion. First, *Barnette* was accepted as correctly decided—the government cannot constitutionally compel an individual to participate in a flag salute ceremony.[127] Additionally, Justice Rehnquist opined that either "wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture" solely because of governmental coercion would constitute an infringement of constitutionally protected individual liberty.[128]

In contrast, Justice Rehnquist offered two counter-examples which, like the state motto embossed on the New Hampshire license plates, would not constitute an unconstitutional governmentally compelled affirmation of belief in his opinion. One was the mottoes "In God We Trust" and "E Pluribus Unum" which appear on American money.[129] The other example was the erection by the government at taxpayers' expense of "a multitude of billboards, each proclaiming 'Live Free or Die.' "[130] *Prune Yard Shopping Center v. Robins*[131] serves as another such example. In *Robins* the United States Supreme Court held that a state could constitutionally require a privately owned shopping mall to allow third persons to speak, distribute pamphlets and circulate petitions on its premises. The argument of Prune Yard Shopping Center that it was being compelled, in violation of the first amendment to the United States Constitution, to use its property as a forum for the speech of others was rejected.[132]

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[125] *Id.* at 721.

[126] 447 U.S. 74 (1980).

[127] 430 U.S. at 720-21.

[128] *Id.* at 720.

[129] *Id.* at 722.

[130] *Id.* at 721.

[131] 447 U.S. 74 (1980).

[132] *Id.* at 85-88.

This array of potentially analogous cases offers an excellent opportunity to test whether a judicial focus on the nature of the individuals' activity in order to determine whether there has been either an actual or apparent assertion of the truth of the government's ideological message has a principled doctrinal foundation. Obviously, it must be remembered that it is insufficient to point out hypothetical cases which, if *Wooley* were decided in one fashion, would be inappropriately decided if the Court adhered to the sanctity of precedent as a mandate for doctrinal consistency. The slippery slope always runs in both directions. Jurisprudential soundness requires a principle which, when consistently applied, justifies acceptable results in each of the proffered hypothetical cases. A focus on the nature of the individuals' activity *always* fails this simple standard.

The essential purpose of the proposed judicial inquiry into whether the individual was placed "in the position of either apparently or actually 'asserting as true' the [government's] message"[133] is to reject as insufficient the implication which arises necessarily from the simple display of the message. Thus, Justice Rehnquist denied there was any compelled affirmation of belief in *Wooley* because the Maynards were simply required to display the state motto, not personally endorse it. The difficulty with this proposed standard is that it wholly fails to distinguish the cases in which even Justice Rehnquist would find a first amendment violation. *Barnette* appears, on superficial examination, to meet this test inasmuch as not merely a flag salute but also a pledge of allegiance was required.[134] On closer examination, however, the Jehovah's Witnesses in *Barnette* objected to participating in the flag salute ceremony on religious grounds and, on this basis, the state regulation compelled only the participation in the ceremony and expressly disclaimed any coercion of belief in the message which the flag salute and pledge of allegiance expresses.[135] Furthermore, this standard also fails to distinguish the case of the required wearing of a lapel button promoting a political candidate, offered by Justice Rehnquist as another example of a constitutionally permissible coerced affirmation of belief unless Justice Rehnquist would invalidate such a lapel button only if it read "I support Ken Candidate for President" rather than merely "Ken Candidate for President." The case of the required waving of a flag as an example suffers from the same infirmity. It is difficult to appreciate the wisdom of a constitutional principle which would have the result turn on the redundancy of a requirement that the flag waver also be compelled to add verbally "and I mean it."

Justice Rehnquist also suggested that a relevant factor in applying his

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[133] 430 U.S. at 721.

[134] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 628-29 (1943).

[135] The official resolution at issue provided: "the West Virginia State Board of Education honors the broad principle that one's conviction about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of the law . . . ." *Id.* at 626-28 n.2.

proposed standard is whether the audience would perceive the governmentally compelled activity as an affirmation of belief in the government's message.[136] The difficulties inherent in any standard based on the perception of an audience are legion.[137] Here, however, the problem is even more fundamental. Mere compliance with a governmental mandate to display an officially approved message, by whatever means, cannot alone be construed reasonably to be anything other than simple obedience to law. Such compliance says nothing about whether the individuals believe, disbelieve, or even care about the content of the government's message. Unless one accepts the intellectually indefensible position that the touchstone is the notoriety of the governmental regulation, any reliance on audience perception is doomed to failure unless other factors are considered.

Justice Rehnquist would apparently resolve this problem by reference to whether the individuals are free to disavow the government's message.[138] Thus, in his view there was no compelled affirmation of belief in *Wooley* because the Maynards were free to disclaim the state motto by attaching a counter-bumpersticker on their automobiles.[139] No doubt such a bumpersticker would prevent viewers from misperceiving the Maynards' actual beliefs. This factor does not, however, distinguish the hypothetical cases offered by Justice Rehnquist in his dissenting opinion in *Wooley*. For example, the school children in *Barnette*, and their parents, were free to "disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute."[140]

If Justice Rehnquist was not suggesting the overruling of *Barnette*, or at least demonstrating an inability to distinguish it, then he must have been implying that the opportunity for individual disclaimer must be contemporaneous in time and space. In addition to the obvious difficulty of identifying the requisite degree of contemporaneity, subsequent decisions of the United States Supreme Court clearly indicate that students subjected to a compulsory flag salute ceremony could contemporaneously register their dissent by wearing an armband[141] or a jacket emblazoned with the slogan "Down With the Salute," or maybe even "Fuck the Salute."[142]

The freedom to disavow the government's message is also present in

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[136] 430 U.S. at 720-21.

[137] *See supra* note 121 and accompanying text.

[138] In *Wooley*, 430 U.S. at 722, Justice Rehnquist states: "Since any implication that they affirm the motto can be so easily displaced, I cannot agree that the state [statute] . . . may be invalidated under the fiction that appellees are unconstitutionally forced to affirm, or profess belief in, the state motto."

[139] *Id.*

[140] *Barnette*, 319 U.S. at 664 (Frankfurter, J., dissenting). *Cf.* Taylor v. Mississippi, 319 U.S. 583 (1943).

[141] *Cf.* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

[142] *Cf.* Cohen v. California, 403 U.S. 15 (1971).

the other examples of impermissible coerced affirmations of belief suggested by Justice Rehnquist. Individuals required to wear a lapel button supporting a political candidate could easily disclaim affiliation with the government's message by wearing a second lapel button.

Despite these analytical difficulties, Justice Rehnquist expressly relied on the ability of the owners of the shopping center in *Robins* to disassociate themselves from endorsement of the third parties' message to distinguish *Wooley* and *Barnette* and justify the finding of no first amendment violation.[143] As Justice Powell observed in his concurring opinion in *Robins*, Justice Rehnquist's methodology does not alleviate the individuals' dilemma but merely shifts its focus:

> The property owner or proprietor would be faced with a choice: he either could permit his customers to receive a mistaken impression or he could disavow the messages. Should he take the first course, he effectively has been compelled to affirm someone else's belief. Should he choose the second, he has been forced to speak when he would prefer to remain silent. In short, he has lost control over his freedom to speak or not to speak on certain issues. The mere fact that he is free to dissociate himself from the views expressed on his property . . . cannot restore his "right to refrain from speaking at all."[144]

Finally, in *Prune Yard Shopping Center v. Robins*, Justice Rehnquist's majority opinion alluded to yet another factor: whether the governmental views would "likely be identified with those of the owner"[145] of the shopping mall compelled to display the message. In order to avoid the obvious conclusion that the simple fact of official compulsion to display the message negates any reasonable inference that the coerced individuals endorse the message, Justice Rehnquist would focus on whether the display of the message was required to be on property "limited to the personal use"[146] of the owner.

This consideration successfully distinguishes *Robins* and justifies the holding that no violation of any first amendment right was present there since the shopping center was "open to the public to come and go as they

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[143] 447 U.S. at 87-88.

[144] *Id.* at 99, *quoting Wooley*, 430 U.S. at 714. Justice Powell also noted that requiring the property owner to identify the messages to which he objects would "force him to relinquish his freedom to maintain his own beliefs without public disclosure." *Id.* at 100, *quoting* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 213, 241 (1977).

Moreover, Justice Rehnquist's analysis frequently places on the individuals the financial burden of expending personal funds for a bumpersticker, or lapel button to disavow personal association with the government's message in situations where the individuals' preference is the exercise of the right to remain silent.

[145] *Id.* at 87.

[146] *Id.*

please."[147] Erection by the government of billboards with ideological statements financed at taxpayers' expense would be an even more extreme example of no constitutional violation because there would be no identification of any particular taxpayer with the message. On the other hand, the compulsory flag salute ceremony in *Barnette* involved such direct personal participation that it serves as an appropriate benchmark for clearly unconstitutional infringements of personal liberty under this analysis.

Barnette and *Robins*, however, mark rather obvious extremes at opposite ends of the spectrum of cases. The difficulty with this methodology is that it places the cases on a continuum and then fails to provide any principled standard to distinguish between the myriad cases which occupy the middle of the spectrum. No doctrinal structure exists to aid in the determination of whether the state motto embossed on New Hampshire license plates is sufficiently closely connected to the person of automobile owners to be violative of the first amendment. Nor is it clear what weight should be given to the personal effort required to install the license plate. The mottoes on American money, "In God We Trust" and "E Pluribus Unum," present similar difficulties of analysis. Thus, Chief Justice Burger, writing for the majority in *Wooley* correctly recognized that while the compulsory flag salute was more offensive than the mandatory license plate display of the state motto, "the difference is essentially one of degree."[148] This insight led the Chief Justice to conclude that the first amendment right to be free of a compelled affirmation of belief was implicated, thus necessitating an evaluation of the state's countervailing interests.[149] What remains unclear, however, is the virtue of focusing on the individuals' activity solely for the purpose of erecting an unnecessary barrier to constitutional adjudication.[150]

Chief Justice Burger, after concluding that the interest in being free from any coerced affirmation of belief was implicated to some unstated and unascertainable extent, wisely placed little reliance on that finding in deciding *Wooley*. Rather than focusing on the nature of the individuals' activity, the majority in *Wooley* premised its analysis on an examination of the character of the governmental regulation.

The state of New Hampshire advanced two interests in support of its statute requiring the display of the state motto, "Live Free or Die," on passenger vehicle license plates: 1) the promotion of an appreciation of history, state pride and individualism, and 2) the facilitation of identification of properly licensed vehicles.[151] The challenged New Hampshire statute attempted to achieve the first state purpose of promoting an ap-

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[147] *Id.*

[148] *Wooley*, 430 U.S. at 715.

[149] *Id.* at 715-16.

[150] *See supra* notes 118-20 and accompanying text.

[151] *Wooley*, 430 U.S. at 716.

preciation of state pride, history and individualism by the mandatory public display of the state motto to all who viewed the passenger vehicle license plates. The evil the governmental regulation was designed to prevent was interference with the public dissemination of the state's message by those who dissented from the government's ideological statement and were thus unwilling to carry the message on their privately owned automobiles. Chief Justice Burger was able to focus the judicial inquiry on the proper question of the compatability of this governmental regulation with the command of the first amendment by phrasing the issue to be "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."[152] The majority's conclusion in *Wooley* was simply that such an ideologically non-neutral, content-based governmental interest is inconsistent with the command of the first amendment.

In order to fully appreciate the doctrinal significance of the holding in *Wooley* it must be recognized that the government does have a legitimate interest in participating in public debate.[153] As Professor Emerson has explained, such governmental participation in the marketplace of ideas is not merely an evil to be tolerated, but

> is an essential feature of any democratic society. It enables the government to inform, explain and persuade—measures especially crucial in a society that attempts to govern itself with a minimum use of force. Government participation also greatly enriches the system; it provides the facts, ideas, and expertise not available from other sources. In short, government expression is a necessary and healthy part of the system.[154]

The recognition of a legitimate governmental interest in the dissemination of its own ideological message, however, is merely a beginning, not the end, of first amendment analysis.[155] This is especially true given the

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[152] *Id.* at 713.

[153] *See, e.g., id.* at 717 ("[T]he State is seeking to communicate to others an official view . . . . Of course, the State may legitimately pursue such interests in any number of ways."); Spence v. Washington, 418 U.S. 405, 409 (1974) ("[T]he state or national governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property."); *Barnette*, 319 U.S. 624, 640 (1943) ("National unity as an end which officials may foster by persuasion and example is not in question.").

[154] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 698 (1970).

[155] The Supreme Court has addressed this topic of government speech only in dicta. *See supra* note 153 and accompanying text. The recent proliferation of scholarly literature is indicative of the fact that the constitutional contours of this governmental interest are yet to be defined. *See, e.g.*, M. YUDOF, WHEN GOVERNMENT SPEAKS (1982); Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1105 (1979); Ziegler, *Government*

potentially limitless reach of this governmental interest. The government's desire to burden individuals' activity on the ground that it is officially deemed to espouse an idea the government believes to be undesirable, unwise, inappropriate or false—an interest which *Barnette* teaches is absolutely impermissible under the first amendment—can easily be rephrased by the government as an interest in preventing interference with a message the government has officially declared to be desirable, wise, appropriate or true. This is so because any individual activity which espouses an idea contrary to the official message competes for public attention and acceptance with the latter and thus reduces to some greater or lesser extent the government's persuasive effectiveness. Thus it would appear that *Wooley* announces an absolute first amendment principle: "[W]here the state's interest is to disseminate an ideology, no matter how acceptable to some, such interest *cannot* outweigh an individual's right to avoid becoming the courier for such message."[156]

Professor David Gaebler, however, has rejected this analysis and has argued:

> While the content-based/content-neutral distinction is appropriate in the affirmative first amendment context, it does not appear applicable to the negative first amendment context. The dangers implicit in government discrimination against particular views do not arise when government discriminates in favor of particular views, at least when it does so either by expressing those views itself or by compelling others to express them. It has been suggested that the "free marketplace of ideas" may be undermined as readily by government protection of particular views. However, this proposition as stated is too broad. Of course special protection of particular views is often tantamount to a restriction upon all other views. Where government protection of particular views works a concomitant restriction on other views, government protection is as injurious to freedom of expression as government restriction. . . . However, when government discrimination in favor of particular views takes the form of the government's merely adding its own voice to the throng on behalf of that view, there is no concomitant restriction on the expression of other views. Government expression does affect the relative quantity of expression of various views but does not restrict any expression on the basis of content. Similarly, government compelled expression does not restrict expression of any specific views but, rather, only affects the relative quantity of all expression. . . . Thus, while compelled expression may infringe upon individual interests it

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Speech and the Constitution: The Limits of Official Partisanship, 21 B.C.L. REV. 579 (1980).

[156] 430 U.S. at 717 (footnote omitted) (emphasis added).

should not be condemned as an interference with the "free marketplace of ideas."[157]

Professor Gaebler's analysis is severely flawed. It must be remembered that federal, state and local governments occupy a unique position in our society due to the enormous power and influence they wield. As Professor Thomas Emerson has noted, the government controls many of the sources of information in our society, has virtually unlimited access to the means of communication, and the nature of governmental expression is qualitatively different than that of expression by private individuals because "[t]he tendency of government expression to be uniform and repetitive in its message gives it a more concentrated impact than other expression."[158] Most importantly, the government possesses a total monopoly on the legitimate use of force, a factor which alone distinguishes the government from any other participant in the arena of public debate. Indeed, *Wooley* limited its holding to the principle that the first amendment prohibits the government from impermissibly abusing its exclusive control of the legitimate use of force in our society by conscripting unwilling citizens as foot soldiers for the public dissemination of its ideological message.[159]

The content-based/content-neutral distinction, then, has great significance regardless of whether the government is burdening individual activity for the purpose of suppressing the content of private expression or for the purpose of favoring the content of governmental expression. No doubt there are dangers implicit in governmental efforts to regulate on a non-content basis, too. To suggest more rigorous constitutional scrutiny for content-based regulations, however, is not to endorse the abandonment of judicial scrutiny of non-content regulations.[160]

The dangers of ideological discrimination are greater when the government regulates on the basis of the content of expression, regardless of source, than when the government simply encourages pluralist expression without regard to the content of the messages. The danger that the government will be unable to fulfill its role as an "umpire," overseeing the effective functioning of the "marketplace of ideas" in an ideologically neutral manner, is always a matter of grave concern. This concern is heightened whenever the government attempts to regulate on the basis of the content of expression. If the government is acting in the conflicting roles of both umpire and participant in the "marketplace of ideas," in *prima facie* violation of the principle that no one should be permitted

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[157] Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. REV. 995, 1008-09 (1982) (footnotes omitted).

[158] *T. Emerson, supra* note 154, at 698.

[159] 430 U.S. at 717.

[160] *See infra* text accompanying notes 183-88.

to be the judge of her own cause,[161] then the vigilance of the judiciary must be very strict indeed.

When the government burdens individual activity in order to favor the content of its own messages and thereby furthers its own ideological self-interest it strikes at the very heart of the first amendment guarantee. Given the pre-existing, natural advantages the government possesses as a participant in the arena of public debate, the danger is enormous that any governmental exercise of its exclusive authority to burden individual activity for the purpose of enhancing its own ideological message will result in the first amendment being uncoupled from its essential function of preserving an open, democratic society.[162] The fundamental principle underlying the constitutional guarantee of free expression embodied in the first amendment was aptly stated by Justice Jackson in *Barnette*: "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."[163] As James Madison recognized, the very "nature of Republican Government," presupposes and demands that "the censorial power is in the people over the Government, and not in the Government over the people."[164] The danger that governmental expression, especially when artificially enhanced by the government's exercise of its total control over the legitimate use of coercion in our society, will drown out countervailing expression by private individuals thus threatens to turn not only the first amendment but also the democratic premise of our government on its head.

The majority opinion in *Wooley* simply recognized that, as a matter of principle, the government interest in compelling unwilling citizens to assist in the dissemination of the government's ideological message by publicly displaying it for the express purpose that it be viewed by others is so intimately connected to the central concerns of the first amendment as to be deemed constitutionally impermissible. This is true whether the government coerces the display of a slogan on a license plate, a flag salute, or the wearing of a campaign button for the proscribed purpose. On this analysis *Wooley* and *Barnette* are, as a matter of fundamental first amendment principle, not merely analogous, but doctrinal twins. It is simply

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[161] *See* United States v. Nixon, 418 U.S. 683, 703-05 (1974); Dworkin, *The Jurisprudence of Richard Nixon*, NEW YORK REV. BOOKS, May 4, 1972, at 27.

[162] *See, e.g.*, A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Gard, *The Absoluteness of the First Amendment*, 58 NEB. L. REV. 1053 (1979); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191. *Cf.* BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

[163] 319 U.S. at 641.

[164] 4 ANNALS OF CONGRESS 934 (1794).

contrary to the democratic premise of the first amendment to allow the government to compel the unconsenting to use their person or privately owned property "as a 'mobile billboard' for the State's ideological message."[165]

The countervailing hypothetical case offered by Justice Rehnquist, in his dissenting opinion in *Wooley*, appears superficially to cast doubt on the doctrinal foundations of this analysis:

> For example, were New Hampshire to erect a multitude of billboards, each proclaiming "Live Free or Die," and tax all citizens for the cost of erection and maintenance, clearly the message would be "fostered" by the individual citizen-taxpayers and just as clearly those individuals would be "instruments" in that communication. Certainly, however, that case would not fall within the ambit of *Barnette*.[166]

Upon closer inspection, however, the appeal of Justice Rehnquist's argument is illusory. Thus, it may be that the prime fallacy of Justice Rehnquist's analysis is his conclusion that "that case would not fall within the ambit of *Barnette*."[167] *Abood v. Detroit Board of Education*[168] is a major precedent suggesting that the first amendment would be violated by any governmentally compelled financial support for ideological governmental expression. In *Abood*, the United States Supreme Court, expressly relying on *Barnette*,[169] held that the governmentally compelled financial support for the ideological activities of a public employees' union, as a condition of government employment, was violative of the first amendment rights of dissenting union members and those required to pay union service charges in lieu of membership dues.[170]

Even if it is true that "the legitimacy of government communication activities, the difficulties in identifying and labeling ideological, noncontroversial, or political speech, and the sheer folly of attempting to calculate how much of an individual's taxes are spent for specific, objectionable government communications"[171] counsel against applying *Abood* to cases involving taxpayers, it does not follow, as Justice Rehnquist argued, that this compels the conclusion that *Wooley* was wrongly decided. In Justice Rehnquist's billboard hypothetical the governmental interest at stake is the government's interest in itself communicating to the populace, not to require individual citizens to unwillingly carry the official message.

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[165] *Wooley*, 430 U.S. at 715.

[166] *Id.* at 721.

[167] *Id.*

[168] 431 U.S. 209 (1977).

[169] *Id.* at 235.

[170] *Id.* at 233-37.

[171] Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 893 (1979).

Inasmuch as the government can only express itself or disseminate its message by the expenditure of tax revenues, to hold that the use of such revenues constitutes an impermissible requirement of participation by the unwilling taxpayer would be to wholly defeat the government's asserted claim of a right to express itself.[172]

The majority opinion in *Wooley* sensitively decided only the issue before it, holding simply that an explicit governmental interest in using its exclusive power of legitimate coercion to conscript unwilling persons as foot soldiers to act as amplifying devices for the public dissemination of its ideological message is so closely related to the central concerns of the first amendment that it cannot be constitutionally permitted.[173] Stated in another manner, an explicit governmental purpose of requiring objecting citizens to advertise publicly the government's message constitutes an unfair method of competition in the marketplace of ideas.

The second governmental interest asserted by New Hampshire in support of its requirement that citizens display the motto "Live Free or Die" on the license plates of their passenger vehicles was the facilitation of identification of properly licensed vehicles.[174] This interest, wholly unrelated to the content of the governmentally compelled message, was premised on the notion that since the motto only appeared on license plates issued for non-commercial vehicles the state could easily discover the misuse of a commercial license plate on a non-commercial vehicle, or vice versa, by reference to the presence or absence of the motto on the license plate.[175] Inasmuch as this was a non-content based governmental interest the Supreme Court subjected it to less rigorous scrutiny. Nevertheless, the New Hampshire regulation could not withstand this lessened standard of review.

First, the Supreme Court pointed out that the state's asserted interest was not supported on the factual record because New Hampshire non-commercial license plates normally bore a specific configuration of letters and numbers which adequately distinguished them from commercial license plates.[176] Second, the Court found that the state could achieve its purpose by "less drastic means."[177] The most obvious less drastic alternative would be for New Hampshire to emboss the word "non-commercial" on the appropriate license plates. In other words, there is a gross constitutional impropriety in the official selection of a content-based governmental means to achieve a non-content-based governmental interest.

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[172] *See* L. TRIBE, *supra* note 17, at 589-91.

[173] 430 U.S. at 717 ("[W]here the state's interest is to disseminate an ideology . . . such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").

[174] *Id.* at 716.

[175] *Id.* at 716 n.12.

[176] *Id.* at 716.

[177] *Id.* at 716-17.

On first impression it would appear that the mottoes "In God We Trust" and "E Pluribus Unum" on United States currency would succumb to the scrutiny applied in *Wooley*. This, however, is not necessarily true. As the Supreme Court noted: "Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto."[178] It is equally true that the traditional use of these mottoes, in a furtherance of the legitimate and indisputably important non-content-based governmental interest in the prevention of counterfeiting, arguably has caused them to lose their ideological character.[179] Most important, however, is the fact that Justice Rehnquist's invocation of this hypothetical is based on a misapprehension of the character of the federal statute at issue. Unlike the New Hampshire statutory scheme, federal law is sensitive to the serious first amendment problem raised by the presence of the national mottoes, "In God We Trust" and "E Pluribus Unum," on United States currency and criminalizes the obliteration of these mottoes only when accompanied by a specific intent to defraud.[180] This may be precisely the sort of a less drastic alternative alluded to in *Wooley*.

In *Prune Yard Shopping Center v. Robins*,[181] the United States Supreme Court upheld a state's non-content-based requirement that a privately owned shopping center open its premises to the speech and petitioning activities of private individuals. In so doing the Court explicitly distinguished *Wooley* as involving a content-based governmental regulation where "the government itself prescribed the message."[182] Consequently, the Supreme Court applied the less rigorous balancing formula traditionally appropriate for the review of non-content-based governmental regulations.[183]

While it is true that the non-content-based regulation at issue in *Robins* served the significant governmental interest and first amendment value of opening a new forum for all speakers and all points of view and presented "no danger of governmental discrimination for or against a particular message,"[184] it cannot be confidently concluded that "[o]pening private property to pluralist expression poses none of the dangers that compelled speech doctrine is designed to prevent."[185] Indeed, this is precisely why judicial review of non-content-based governmental regulations, although properly less rigorous than the scrutiny applied to content-

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[178] *Id.* at 717 n.15.

[179] *Cf.* School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

[180] *See, e.g.*, United States v. Sheiner, 273 F. Supp. 977 (S.D.N.Y.), *aff'd*, 410 F.2d 337 (2d Cir. 1967); United States v. Lissner, 12 F. 840 (Mass. 1882).

[181] 447 U.S. 74 (1980).

[182] *Id.* at 87.

[183] *Id.*

[184] *Id.*

[185] *The Supreme Court,. 1979 Term*, 94 HARV. L. REV. 77, 171 n.23 (1980).

based regulations, is not toothless. On the other hand, Professor Gaebler is simply wrong when he asserts:

> Moreover, the content-based/content-neutral distinction also fails to help identify negative first amendment cases in which the infringement of individual interests is particularly severe. For example, the Court held in *Barnette* that the state may not require school children to recite the pledge of allegiance. Suppose instead a state requirement that school children recite, not the pledge of allegiance per se, but rather, a message to be selected by some non-government entity and that message selected happened to be the pledge of allegiance. Although in this case the government would not have mandated any particular message, the infringement of individual interests would not seem any less severe.[186]

It is inappropriate to criticize the Court's lesser scrutiny of non-content regulations with an example of a content regulation; clearly the government cannot avoid *Barnette* by delegating the choice of the message to a particular private organization and then placing its monopoly police power behind the message selected. Thus, Professor Gaebler is correct, in a perverse sense, when he concludes that "it makes little difference whether it is the government or the nongovernmental entity that chooses the specific message."[187] Unfortunately, the flaw in Professor Gaebler's analysis is that he ignores the central tenet of permissible non-content governmental regulations, expressed most clearly in the Supreme Court's "public forum" cases, that if a forum is open to one person or idea it must be equally open to all.[188]

V. CONCLUSION

Justice Frankfurter, prior to his appointment to the United States Supreme Court, made a comment which later guided his judicial performance in free speech cases: "[W]ith the great men of the Supreme Court constitutional adjudication has always been statecraft. . . . The great judges are those to whom the Constitution is not primarily a text for interpretation but the means of ordering the life of a progressive people."[189]

In contrast to the view of Justice Frankfurter, Justice Jackson did not believe that the only choice of a proper role for a jurist was either deferential or activist Platonic Guardian.[190] The clear import of the majority opinion in *Barnette* was that the members of the Court had a duty to expound

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[186] Gaebler, *supra* note 115, at 1010.

[187] *Id.*

[188] *See, e.g.*, Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

[189] F. FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 75-76 (1930).

[190] *See* Griswold v. Connecticut, 381 U.S. 479, 526-27 (1965) (Black, J., dissenting), *quoting* L. HAND, THE BILL OF RIGHTS 73 (1958).

the fundamental law of the Constitution and not to act as statesmen, with or without a sense of modesty, determining as a matter of "personal preference" whether "the legislators" solution is too strong for the "judicial stomach."[191] For Justice Jackson the Constitution was a text for judicial interpretation, and it was the Court's constitutional duty to enforce the first amendment's command that the government is absolutely proscribed from attempting to achieve political orthodoxy by the means of compelling or prohibiting the expression of any statement because of the ideological agreement or disagreement of those who hold political office at that time in history. In the first "balancing"/"absolute" debate, the absolutist, Justice Jackson, had all the better of the argument.

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[191] L. HAND, THE BILL OF RIGHTS 70:

> [J]udges . . . do not, indeed they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary they wrap up their [decision] in a protective veil of adjectives such as "arbitrary," . . . reasonable, . . . or "essential," whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision . . . .